

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:

**FRANK SIMMONS
ANTOINETTE SIMMONS
DEBTORS**

**CASE NO. 11-30313
CHAPTER 13 BANKRUPTCY**

**FRANK SIMMONS
ANTOINETTE SIMMONS
PLAINTIFFS**

V.

ADV. NO. 13-03265

**REGENTS PARK ESTATES RESIDENTIAL
ASSOCIATION, INC. AND
RIDDLE & WILLIAMS, P.C.**

DEFENDANT

AGREED MOTION TO DISMISS ADVERSARY PROCEEDING WITH PREJUDICE

TO THE HONORABLE BANKRUPTCY JUDGE JEFF BOHM:

Plaintiffs ("Mr. and Mrs. Simmons") would show the Bankruptcy Court as follows:

JURISDICTION / CORE PROCEEDING

1. The Court has jurisdiction of this matter. This represents a core proceeding. Because this is a matter governed by 11 U.S.C. § 362(k)(1), the Court may issue a final order in this case.

AGREED

2. On October 10, 2013 the Defendant, Regents Park Estates Residential Association, Inc. filed an answer to the First Amended Complaint. (Doc #9). On November 15, 2013 the Second Amended Complaint was filed in this adversary

proceeding, as allowed by this Court. The Second Amended Complaint added Riddle & Williams, P.C. as a party Defendant. (Doc #21). However, since the filing of the Second Amended Complaint the parties have agreed to compromise and settle the allegations as averred therein. As part of the consideration of the settlement, the parties agree to the dismissal of this adversary proceeding with prejudice.

**BASIS OF DISMISSAL OF ADVERSARY PROCEEDING
BY MEANS OF A MOTION TO DISMISS**

3. The stated causes of action in the adversary proceeding involve alleged post-petition violations of the automatic stay provisions pursuant to 11 U.S.C. § 362(k)(1). The 5th Circuit has determined that § 362(k)(1) actions constitute a “private remedy”. *St. Paul Fire & Marine vs. Labuzan*, 579 F.3d 533, 538 (5th Cir. 2009). It is doubtful that the Trustee can bring or maintain a § 362(k)(1) cause of action. *Id* at 545. Mr. and Mrs. Simmons’ § 362(k)(1) cause of action does not belong to the Trustee. *Id* at 545. And, § 362(k)(1) claims are not property of the estate. *Id* at 545. The settlement, having been entered between the debtors and a creditor, does not appear to be property of the bankruptcy estate or belonging to the Trustee. As such, F. R. Bankr. P. 9019 does not appear to be applicable in that it is limited to a motion filed by the trustee, or on behalf of the Trustee, or otherwise concerns property of the estate.

**THE CHAPTER 13 TRUSTEE’S OFFICE HAS BEEN
INFORMED OF THE SETTLEMENT AND THIS MOTION**

4. Pursuant to the terms of the settlement agreement, the Chapter 13 Trustee has been provided a copy of the settlement entered herein. The Trustee has also been provided a copy of this Motion, and has signed off on this Motion.

THE SETTLEMENT AGREEMENT IS ATTACHED

5. The settlement agreement, signed by the parties, is attached for the Court's review.

WHEREFORE, PREMISES CONSIDERED, it is the prayer of Mr. and Mrs. Simmons, Movants/Plaintiffs, that the Court allow the immediate dismissal of this adversary proceeding with prejudice so that the private settlement may be consummated.

Respectfully submitted,

/s/ Charles (Chuck) Newton

CHARLES (CHUCK) NEWTON

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AGREEMENT AND
SIGNATURE OF DEFENDANTS' ATTORNEY

/s/ Chad E. Robinson

CHAD E. ROBINSON

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TRUSTEE'S RECOGNITION OF THE SETTLEMENT
AGREEMENT AND MOTION FILED

/s/ Richard Aurich

RICHARD AURICH
Attorney
Office of the Chapter 13 Trustee,
David Peake

CERTIFICATE OF SERVICE

I certify that on the 3rd day of January, 2014 a true and correct copy of the foregoing Agreed Motion to Dismiss Adversary Proceeding with Prejudice was served on the following parties by the means stated below:

Frank Simmons
Antoinette Simmons
Debtors / Plaintiffs
5306 Perrington Heights Lane
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FAX (No)
EMAIL (Yes)

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Chad E. Robinson
Riddle & Williams, P.C.
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DATED: January 3, 2014

/s/ Charles (Chuck) Newton

CHARLES (CHUCK) NEWTON